Immunocept, LLC, et al v. Fulbright & Jaworski Doc. 26

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
JAN 25 2006
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY ______ DEPUTY CLERK

IMMUNOCEPT, LLC, PATRICE ANNE LEE, AND JAMES REESE MATSON,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CAUSE NO. A050A334 SS
	§	
FULBRIGHT & JAWORSKI, LLP,	§	
	§	
Defendant.	§	

EMERGENCY SUPPLEMENT TO DEFENDANT FULBRIGHT & JAWORSKI, LLP'S MOTION FOR PROTECTIVE ORDER, OR, ALTERNATIVELY, TO COMPEL DEPOSITION OF PLAINTIFFS' EXPERT WITNESSES, OR, ALTERNATIVELY, FOR MODIFICATION OF SCHEDULING ORDER

COMES NOW, Fulbright & Jaworski, LLP ("Fulbright"), and files this Emergency Supplement to its Motion for Protective Order, or, Alternatively, to Compel Deposition of Plaintiffs' Expert Witnesses, or, Alternatively, for Modification of Scheduling Order, and in support thereof, would respectfully show the Court as follows:

As described in the recently filed Motion for Protective Order, the Plaintiffs in this case have designated Australian[1] Dr. Rinaldo Bellomo as their expert witness on scientific issues related to the above-captioned litigation. The Plaintiffs refused, despite multiple requests, to make Dr. Bellomo available for deposition prior to the close of discovery in this case.

Uninterested in reaching a reasonable compromise to address the delay in discovery occasioned by the Plaintiffs' refusal or inability to produce Dr. Bellomo for a timely deposition, the Plaintiffs began serving subpoenas on Fulbright's experts as soon as the Motion for

[1] The Plaintiffs repeatedly have cited Dr. Bellomo's location as justification for the delay in producing him for deposition. Setting aside the questions raised by the apparent need to reach across the globe to find an expert to support the Plaintiffs' position, Fulbright should not be prejudiced by that decision of the Plaintiffs.

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Protective Order was filed. Fulbright's Motion was served on the Plaintiffs on January 23, 2006, and Keith Ugone (in the Northern District of Texas) and Phil Phillips (in the District of Columbia), two of Fulbright's expert witnesses, were served with subpoenas on January 24, 2006. The Plaintiffs have indicated that they will also serve a subpoena on another of Plaintiffs' experts – in the Western District of Philadelphia – for a deposition date prior to that on which he is available.

The subpoena directed to Keith Ugone directs him to appear for deposition on February 3, 2006. That date is *before* the Plaintiffs' response to the Motion for Protective Order is due to this Court, gives little time for a motion to quash to be heard in the court that issued the subpoena (the Northern District of Texas), and also is a date on which Dr. Ugone is unavailable.

The subpoena directed to Phil Phillips directs him to appear for deposition on February 13, 2006. That is a date before Dr. Bellomo's deposition *and* the next business day after the deposition of Plaintiffs' expert on FDA issues, the subject about which Mr. Phillips has offered opinions. Further, it is a date on which Mr. Phillips is unavailable.

Because Fulbright's Motion for Protective Order would resolve, in one forum, the dispute about the relative timing of Dr. Bellomo's deposition and Fulbright's experts, Fulbright asks this Court to shorten the Plaintiffs' time to respond to the Motion for Protective Order and to resolve expeditiously this dispute. Otherwise, Motions to Quash will need to be litigated in the Western District of Philadelphia, the District for the District of Columbia, and the Northern District of Texas, all in the next week. Judicial efficiency would be disserved, with multiple judges reviewing and resolving these issues, and still without addressing the core issue: can the Plaintiffs unilaterally decide to provide a deposition of Dr. Bellomo *after* the close of discovery and expect Fulbright to produce its experts responding to issues hinging upon his testimony *before* he actually gives his testimony? This Court is the only one before which that issue has been raised, and this Court is the one that should decide it. The outcome of that decision will moot the Motions to Quash that will otherwise need to be filed and heard on an expedited basis in other federal district courts.

CONCLUSION AND PRAYER

Fulbright respectfully requests that this Court shorten the time for Plaintiffs' Response to the Motion for Protective Order, so that the Court can rule upon the Motion for Protective Order prior to February 1, 2006.

Respectfully submitted,

By:______________________________

David J. Beck
Texas Bar No. 00000070
Geoff A. Gannaway
Texas Bar. No. 24036617
1221 McKinney St., Suite 4500
Houston, Texas 77010-2010
Telephone: (713) 951-3700
Facsimile: (713) 951-3720

ATTORNEYS FOR DEFENDANT FULBRIGHT & JAWORSKI, LLP

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served as shown below on counsel of record on January 24, 2006.

Via Facsimile and Certified Mail, Return-Receipt Certified
Michael P. Lynn, P.C.
Jeffrey M. Tillotson, P.C.
John D. Volney
Jeremy Fielding
Lynn Tillotson & Pinker, LLP
750 N. St. Paul St., Suite 1400
Dallas, Texas 75201

Geoff A. Gannaway

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